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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re LESTER CHERRY on Habeas Corpus.	D057731 (San Diego County Super. Ct. No. HC19969, CR62467)

Petition for writ of habeas corpus; relief denied.

In this habeas proceeding, Lester Cherry argues there is no evidence to support the Governor's reversal of his grant of parole by the Board of Parole Hearings (Board) in 2009. Applying the deferential "some evidence" standard, we conclude the record supports the Governor's finding that defendant poses an unreasonable risk of current dangerousness if released into the community. We also reject defendant's assertions that the Governor's review constitutes an unconstitutional ex post facto application of a law, and that the Governor failed to give his case individualized consideration. Accordingly, we deny defendant's request for relief.

FACTUAL AND PROCEDURAL BACKGROUND

In 1983, when he was 32 years old, defendant pleaded guilty to second degree murder and received a 15-years-to-life sentence. He entered prison in August 1983, and was denied parole by the Board in 1997, 2001, and 2005. In November 2009, the Board decided that defendant was suitable for a parole grant. Defendant was 58 years old and had served 19 years in prison for the murder.[1] The Governor disagreed with the Board's conclusion and in March 2010 reversed the parole grant. Defendant filed an unsuccessful habeas petition in superior court, and now seeks habeas relief in this proceeding.[2]

The Commitment Offense

At about 2:00 a.m. on April 13, 1983, defendant shot and killed his friend Donald Hill while the two were outside defendant's residence. Defendant had a long history of substance abuse, beginning when he was a teenager. By 1983 his substance abuse had escalated to the point where he was using amphetamines intravenously and experiencing paranoid and delusional thinking. Several weeks before shooting Hill, defendant engaged in a series of violent acts. On February 7, 1983, he shot a gun into his bedroom ceiling at his mother's house; shot at a neighbor's house and car; drove to a location where he shot five times at a man in a garage; and robbed a man at gunpoint in a parking lot. When

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1 Defendant had been in prison for a total of 26 years, based on a seven-year determinate sentence for another offense, plus 19 years on his life sentence for the murder.

2 We issued an order to show cause, received briefing, and heard argument on the matter.

interviewed by the police after his arrest for these offenses, defendant stated he was being followed by the FBI and he had enough and was going to stop it.[3]

On February 17, 2003, defendant was released from jail on bail. He thereafter agreed to plead guilty to armed robbery in exchange for dismissal of the other counts arising from the February 7 offenses. In a report filed April 11, 1983, the probation officer reported that defendant stated he committed the February 7 offenses because he was "under the influence of drugs, wired, and controlled from some unknown force . . . ." Defendant told the probation officer that he felt "he will probably kill somebody unless he is given help in a mental hospital."[4] Defendant shot Hill on April 13, 1983, while he was still released on bail for the February 7 offenses.

On the night of Hill's murder, defendant, Hill, and Hill's girlfriend (Anita Sharp) had engaged in a night of drinking at various bars. The facts surrounding the shooting are derived from Sharp's statements to the police and her testimony at the preliminary hearing, and from defendant's statements to the probation officer and prison evaluators and his testimony at the parole hearing.

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3 Defendant told the police he was under surveillance by the FBI; the neighbor (at whose house and car he shot) was a police officer involved with FBI surveillance; he had had enough of being followed and was going to stop it; he shot at the man in the garage (whom he knew) because the man would not talk to him about why the FBI was following him; and he robbed the man in the parking lot because he needed gas money.

4 Defendant told the probation officer that he used methamphetamine almost daily; wires had been implanted from his nose to his brain; he was being spied on by the FBI and other governmental agencies; he had hallucinations that increased when he took drugs; and some unknown individuals had control of him and made him do things that he would not otherwise do.

While drinking at a bar, defendant and Hill started arguing about various matters, including Hill's assault on a mutual friend (which defendant thought was wrong). Defendant called Hill a "punk," and their argument escalated into a physical fight during which (according to defendant) Hill was the aggressor. The bartender told them that they could not fight in the bar and they had to go outside. Once outside, defendant started walking away from Hill to hitchhike home, but when Hill called out to him, defendant decided to ride home with Hill. On the way to defendant's home, Sharp heard defendant tell Hill that Hill's mother was like a mother to defendant, and that Hill was like a brother to defendant. Defendant told Hill, "'You may never accept this, but I'm your home boy,'" which meant that Hill was his friend.

When they arrived at defendant's home, Hill and defendant resumed physical contact. According to Sharp, Hill punched and shoved defendant playfully, and defendant told Hill not to "fool around" in the house and they should go outside so they would not wake defendant's mother. According to defendant, Hill kicked him in the groin and hit him with his fists in the face and chest, and defendant told Hill to leave the house.

Sharp and Hill went outside. Sharp went behind a van parked in the carport directly in front of Hill's car, and Hill raised the hood of his car to start the engine.[5] According to Sharp, defendant walked outside; put a rifle on the roof of the car; in a calm, unemotional tone stated "'I got your home boy here'"; and then shot Hill one time.

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[5] Hill's car had an ignition problem that required starting the engine by jiggling wires or using a screwdriver under the hood.

When interviewed by the probation officer, defendant stated he knew Hill had a long history of violent behavior; he had seen Hill attack other people; and he had known Hill to carry a sawed-off shotgun and baseball bat in this car. Defendant stated he took the loaded rifled outside because he was afraid of what Hill might do to him. He stated that he laid the rifle on the roof of the car, pointed it toward Hill, and said, "'I want you to go home.'" Defendant claimed he did not intend to kill Hill and the gun went off accidentally, explaining that "the rifle was a heavy World War I gun that slipped out of his hands. As it hit the roof of the car, it went off."

After shooting Hill, defendant went inside his house, called the police, and told them he had just shot someone in his driveway and he wanted an ambulance and a police car. When the police arrived, defendant complied with their order to come outside, told them the gun was in the house, and was arrested without resistance.

Hill died of a gunshot wound to the chest. Defendant pleaded guilty to second degree murder and was sentenced to 15 years to life in prison. Defendant also pleaded guilty to robbery with use of a firearm for his violent conduct on February 7, 1983, and he received a consecutive seven-year determinate sentence for this offense.

Defendant's Substance Abuse and Attitude Toward His Crimes

According to prison records, in 1983 defendant's chronic amphetamine use caused paranoid ideation and psychotic episodes that resembled schizophrenia, and he experienced amphetamine withdrawal symptoms that resembled major depression. He also abused alcohol to modulate the effects of the amphetamines. Defendant acknowledged to prison evaluators and to the Board that he had been a serious substance

abuser. He recognized that drugs and alcohol played a "big part in everything that [he had] ever done wrong." He stated he was violent and explosive and was "like a Jekyll and Hyde" type of person. He stated his violent conduct in February 1983 (which he did not remember clearly) involved a dispute with some drug dealers who had come to his mother's home, and he then confronted them at their residence. He did not think he would have acted so violently if his thinking had not been so distorted by substance abuse. When defendant shot Hill in April 1983, he had stopped his intravenous drug use, but he had been drinking all evening and was in withdrawal from his amphetamine use.

Defendant told prison evaluators and the Board that he did not intend to shoot or kill Hill. He maintained that when he was inside his house, he heard a noise outside, which he subsequently learned was Hill opening the hood of his car. Defendant could not see Hill, and he thought the noise he heard was Hill opening and closing the trunk of the car to retrieve a gun. Defendant stated he had witnessed past incidents where Hill had been violent, and he assumed Hill had retrieved a weapon and was returning to kill him. Responding to what he thought was a threat, defendant retrieved a rifle and chambered a round. He brought the rifle outside "as a . . . show [of] force," with the intent to make Hill leave and no intent to hurt his friend. He went to the opposite side of the car from Hill and "'threw the gun up'" to show Hill. He told Hill they were "homeboys"; asked why they were fighting; and told Hill to go home.

Defendant claimed that he brought the rifle up in a brandishing posture, and the gun accidentally discharged as he was bringing it up or down.[6] Defendant acknowledged that he had cocked the gun and his finger was on the trigger. He stated the shooting shocked him, and pointed out that he called the police and asked for an ambulance.

In 2005, defendant told an examining psychologist: " 'I feel after all these years, it was a manslaughter. It was an accident, the gun going off from the weight of the gun going forward.' " In 2009, defendant explained that he agreed to plead guilty to second degree murder despite believing his action was accidental because he wanted to spare Hill's mother and his own mother the additional pain of a trial.

Defendant acknowledged that he was fearful and misperceived Hill's actions, believing Hill was getting a gun when in fact Hill was using a screwdriver to start his disabled car. He told prison evaluators and the Board that he was fully responsible for Hill's death because he was the one who brought the gun on the scene. He thought about the offense every day, and he felt sorrow for Hill's family. He stated the shooting "just turns [his] stomach"; he did not know how he "could ever [have] done anything like that"; he caused a lot of hurt and pain; and "'[w]hat a pile [he] was.'" At the 2009

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6 A 2001 correctional counselor's report summarizes defendant's description of the incident as follows: "[Defendant] brought the weapon up in a brandishing posture, when he was bringing the weapon back down it hit the car and discharged." A 2005 correctional counselor's report summarizes defendant's version as follows: "[Defendant] brought the rifle up in a brandishing posture, but the weight of the rifle and the upward momentum coupled with his intoxication caused the accidental discharge of the weapon." In 2009, defendant told the Board, "[W]hen I threw the gun up the momentum of the gun went forward, it pulled in the trigger and it went off. . . . [¶] . . . [¶] . . . I threw the rifle up . . . the weight of the rifle went forward and my finger was on the trigger and the gun went off."

hearing, he told the Board: "I take full responsibility of it, of what happened. I was in the wrong. But at the time I thought I was doing what I thought I was hearing and what I thought I imagined what he was going after, because I know him and I know what he's about and what he does. And so I was just trying to protect and get him out of the driveway, get him to leave. . . . [¶] . . . [¶] . . . And, yes, I was responsible for killing him. It was an accident, it's hard for anybody to believe that because I had no intent to kill him, but I'm still responsible for taking his life."

Prison Evaluation Reports

While in prison, defendant's mental condition was stabilized through medication and psychiatric treatment. In 1994, he was found in possession of amphetamines. In 1997 he started attending Alcoholics Anonymous (AA) and/or Narcotics Anonymous (NA) meetings and stopped his substance abuse. Since then he has participated in a variety of rehabilitation programs and has completed college-level classes. He has been disciplinary free since 1997; has never had a disciplinary violation involving violence or destruction of property; and has received numerous laudatory reports from his work supervisors and other prison staff. To prepare for his possible release from prison, he secured an NA sponsor in the community; arranged to enroll in a program (Options Recovery Services) that would provide transitional housing and reentry programs; and had letters of support from several family members who would assist with housing, funds, and employment.

Prison evaluators attributed defendant's violence prior to his incarceration to his substance abuse. In October 1983, shortly after his imprisonment, a psychologist

reviewed his history, including his substance abuse, and opined that "his impulse control has been marginal for a number of years and explains much of his criminal involvement," but he "does not fit the dynamic of a violent or aggressive individual." Similarly, in his most recent 2009 psychological evaluation, the evaluator stated that defendant's extensive history of poor behavioral control and impulsivity began when he started using amphetamines and he was now committed to the 12-step recovery process. He placed in the low risk range for future violence and recidivism on three empirically-based assessment tests, and the 2009 evaluator opined that overall he was at a low risk of committing violence if released.

Concerning defendant's insight into his conduct, in 1990 and 1997, prison evaluators assessed that although defendant expressed sincere remorse for the offense, he minimized his role by claiming the shooting was an accident. Similarly, in 2005, the evaluating psychologist stated: "He demonstrated limited capacity for insight, minimizing his responsibility for his crime." In 2001 and 2009, prison evaluators viewed the issue differently, opining that although he claimed the shooting was an accident, he displayed insight and had taken responsibility for the crime.

Board's Decision to Grant Parole

At the parole hearing before the Board on November 4, 2009, the deputy district attorney argued defendant was not yet ready for a parole grant because of his history of drug and alcohol abuse, and because his insight into the crime was questionable given that he continued to minimize the offense and claim it was an accident. The deputy district attorney asserted that it was clear that defendant brought the weapon out of his

house with the intent to use it. Arguing for a parole grant, defendant's counsel asserted defendant had shown sincere remorse and insight and had taken responsibility for his crime; he had been sober and attending AA and NA meetings for many years; he had been assessed as a low risk of future dangerousness; he had found an NA sponsor and programs to help him outside in the community; and he had strong family support.

The Board concluded that defendant was suitable for parole because he no longer posed a risk of danger to society. The Board stated the commitment offense was troubling because defendant came out of the house with a loaded and cocked rifle and shot Hill "totally out of the blue." However, the Board stated defendant was "obviously being very paranoid because of [his] drug addiction." The Board reasoned that defendant did not pose an unreasonable risk of danger if released because he now recognized he was not acting in self-defense; he had shown insight and sincere remorse; he recognized that alcohol and drug use played a role in the offense and that he was responsible for the crime; he had participated in self-help and therapy programs; he was sincere in his commitment to maintaining his sobriety and had a letter of support from a sponsor in the community; he had received laudatory letters from correctional staff; and he had demonstrated a stable social history by reconnecting with his family. The Board noted he had not had any disciplinary violations involving violence while in custody and the assessment test results placed him at a low risk if released. The Board conditioned its parole grant on his participation in the Options Recovery Services program because of his extensive substance abuse history.

Governor's Reversal of Parole Grant

On March 30, 2010, Governor Arnold Schwarzenegger reversed the Board's decision to grant parole. The Governor reviewed the positive factors in defendant's case, including his academic studies while incarcerated, his prison work history, his participation in self-help and therapy groups, his family support, and his plans to live and work at Options Recovery Services if released.

However, the Governor concluded that despite these positive factors, defendant remained an unreasonable risk of danger if released. The Governor stated that his offense was "especially atrocious because his actions — shooting his intoxicated, unarmed friend of 15 years while free on bail for a separate armed robbery offense after the two had spent the evening together — demonstrated an exceptionally callous disregard for human life and suffering."

The Governor reasoned that although defendant stated he accepted responsibility for his actions and had participated in therapy and other programs, he failed to gain adequate insight into the circumstances of his offense and to fully accept responsibility. The Governor discredited defendant's claims that he retrieved the rifle for protection from Hill and that the shooting was accidental. The Governor stated that at the 2009 parole hearing, defendant "explained that he retrieved the gun when he saw Hill approaching the trunk of his car" because he believed Hill was retrieving a weapon. The Governor noted, however, that Hill was opening the hood of his car, not the trunk, and defendant could not have mistaken Hill's action because "'[i]t's pretty clear where the hood is in the front, and the trunk is in the back.'" The Governor cited the fact that prior to the shooting of Hill,

defendant had been involved in a similar incident in which he fired a gun at people.[7] The Governor agreed with the deputy district attorney's assessment that it was clear defendant brought the rifle out of his house with the intent to use it against Hill. The Governor concluded that defendant "armed himself with a rifle, cocked the gun, pursued Hill, pointed the rifle at Hill, and shot him to death."

To support his lack of insight finding, the Governor cited the 1990 mental health report in which the evaluator concluded that defendant minimized and rationalized his commitment offense by claiming the shooting was an accident. The Governor also referred to defendant's statement to the 2005 mental health evaluator that he felt the offense was manslaughter because he had the gun for protection, and the shooting was an accident in that the gun went off from the weight of the gun going forward.

The Governor concluded that defendant's lack of insight and failure to accept full responsibility rendered his life offense still relevant to the determination that he continued to pose a current, unreasonable risk to public safety "because he cannot ensure that he will not commit similar crimes in the future if he does not completely understand his offense." Accordingly, the Governor reversed the Board's decision to grant parole.

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7 Citing a probation report, the Governor's decision states that the prior shooting incident occurred "just days" before the shooting of Hill. The probation reports in the record state the prior shooting incident occurred on February 7, 1983, which was two months before the April 13, 1983 shooting of Hill. We assume the Governor was referring to the February 7 incident.

DISCUSSION

I. *Lack of Evidence Contention*

A. *Governing Law*

When a prisoner is eligible for release on parole, parole must be granted unless public safety requires a lengthier incarceration. (*In re Shaputi*s (2008) 44 Cal.4th 1241, 1257-1258.) To deny parole, the inmate must pose an unreasonable risk of current dangerousness to public safety. (*Id.* at pp. 1254, 1256.) Evaluation of current dangerousness requires an individualized consideration of the inmate's case, a review of the full record before the Board, and consideration of such factors as the passage of time and attendant changes in the inmate's mental attitude. (*Id*. at p. 1255.) The circumstances of the commitment offense should not be viewed in isolation, and they "are relevant only insofar as they continue to demonstrate that an inmate currently is dangerous." (*Ibid*.)

The Board is authorized to grant or deny parole, subject to the Governor's authority to reverse the Board's decision. (*In re Shaputis, supra*, 44 Cal.4th at pp. 1256-1258.) The Governor undertakes an independent, de novo review of the inmate's suitability for parole, and the Governor may be more stringent or cautious in determining whether an inmate poses an unreasonable risk to public safety. (*Id*. at p. 1258.) The Governor may make credibility determinations when evaluating the documents submitted by the Board, may draw reasonable inferences from the evidence, and is not bound by the facts found during the adjudication of the underlying offense. (See *Ibid.*; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 678-679; *In re Smith* (2009) 171 Cal.App.4th 1631,

1639; *In re Tripp* (2007) 150 Cal.App.4th 306, 312-314, 318; *In re Arafiles* (1992) 6 Cal.App.4th 1467, 1477.)

Parole may properly be denied if the inmate denies or minimizes his or her culpability so as to reflect a failure to take responsibility or lack of insight about the crime. (*In re Shaputis*, *supra*, 44 Cal.4th at p. 1246; Cal. Code Regs., tit. 15, § 2402, subds. (b), (d)(3) [relevant parole factors include the prisoner's past and present attitude toward the crime, and signs of remorse].) However, parole denial may not be based merely on the inmate's refusal to admit guilt of the commitment offense. (See Pen. Code, § 5011; Cal. Code Regs., tit. 15, § 2236; *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110; *In re McDonald* (2010) 189 Cal.App.4th 1008, 1018; *In re Twinn* (2010) 190 Cal.App.4th 447, 466.)[8]

That is, if the inmate's version of the incident underlying the commitment offense is "not necessarily inconsistent with the evidence," the inmate's refusal to adopt the prosecution's version cannot alone support parole denial. (*In re Palermo*, *supra*, 171 Cal.App.4th at pp. 1100, 1112 [lack of insight finding based on defendant's insistence that shooting was accidental; finding not supported in case where defendant's claim that he thought he had emptied bullets from gun when he "foolishly" fired at his girlfriend while playing "'cowboy'" was not "physically impossible and did not strain credulity"];

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8 Penal Code section 5011, subdivision (b) states: "The Board of Prison Terms shall not require, when setting parole dates, an admission of guilt to any crime for which an inmate was committed." Title 15, California Code of Regulations, section 2236 states in relevant part: "The board shall not require an admission of guilt to any crime for which the prisoner was committed. . . ."

see also *In re Twinn, supra,* 190 Cal.App.4th at p. 468 [lack of insight finding based on defendant's claim of no intent to kill; finding not supported in case where victim died from both defendant's beating and preexisting heart disease]; *In re McDonald, supra,* 189 Cal.App.4th at pp. 1017, 1023 [lack of insight finding based on defendant's claim that he did not participate in murder; finding not supported in case where defendant was convicted based primarily on testimony of members of secret society implicated in murder]; *In re Macias* (2010) 189 Cal.App.4th 1326, 1332, fn. 1, 1348-1349 [lack of insight finding based on defendant's denial of beating victim (who died from drugs provided by defendant); finding not supported in case where there was no evidence defendant did in fact beat victim].)

In contrast, a parole denial may be properly premised on the inmate's refusal to acknowledge his or her culpability in a case where the record contains compelling evidence that refutes the inmate's version and supports the prosecution's version. (See, e.g., *In re Shaputis, supra,* 44 Cal.4th at pp. 1246-1250, 1260 [lack of insight finding based on defendant's insistence that shooting of wife was unintentional; finding supported in case where defendant had long history of domestic violence and had shot at wife several months before the murder]; *In re Rozzo* (2009) 172 Cal.App.4th 40, 60-63 [lack of insight finding based on defendant's denial of participation in murder and of racial animus; finding supported in case where defendant acknowledged participating in kidnapping and beating of victim while making racial slur]; *In re Smith, supra,* 171 Cal.App.4th at pp. 1633-1635, 1638-1639 [lack of insight finding based on defendant's denial of participation in fatal beating of daughter; finding supported in case where

victim's sister testified defendant participated in beating]; *In re Taplett* (2010) 188 Cal.App.4th 440, 443, 449-450 [lack of insight finding based on defendant's claim that she did not think codefendant intended to kill victim in drive-by shooting; finding supported in case where codefendant stated she wanted to " 'bust a cap' " on victim and (while defendant was driving) codefendant had earlier shot at victim's vehicle].)

On appeal from the Governor's decision reversing a parole grant, we affirm if there exists "some evidence" supporting the Governor's conclusion that the inmate currently poses an unreasonable risk to public safety. (*In re Shaputis, supra,* 44 Cal.4th at p. 1258.) The Governor has discretion to determine how to consider and balance the relevant factors, and we may not reweigh those factors or substitute our own parole suitability determination for that of the Governor. (*Id.* at pp. 1255, 1260-1261.) We affirm as long as the Governor's interpretation of the evidence is reasonable; the decision reflects due consideration of all relevant factors as applied to the individual prisoner in accordance with applicable legal standards; and there is some evidence in the record that supports the Governor's finding of current dangerousness. (*Id*. at pp. 1258, 1260-1261.)

B. *Analysis*

Defendant has recognized that he misperceived the victim's actions and that the victim was, in fact, not retrieving a weapon from his car. Defendant has expressed remorse for his conduct and stated that he was responsible for the victim's death because he brought the gun outside. However, defendant has stopped short of admitting that he pulled the trigger on the gun, but rather maintains the gun went off accidentally as he moved it upward or downward by the roof of the car. The Governor could reasonably

conclude that defendant's continued insistence that the shooting was accidental reflects a lack of insight into his behavior because the record contains compelling evidence that defendant pulled the trigger.

The Governor's finding that the record clearly shows an intentional shooting is supported by defendant's conduct previous to and on the night of the shooting of Hill. A few weeks before shooting Hill, defendant essentially went on a shooting rampage, shooting at a neighbor's residence and a man in a garage. Just before being shot, Hill had gone outside in response to defendant's demand that Hill leave the residence, and defendant was in a place of *safety* inside his house. Although defendant claimed to be fearful and paranoid, defendant did not barricade himself inside his house, but instead, armed with a loaded rifle and with the gun cocked and his finger on the trigger, went outside after Hill. The Governor could reasonably infer that these circumstances created a compelling inference that defendant was *pursuing* Hill and intended to fire the gun at Hill.

Furthermore, defendant has never even acknowledged that given his intoxicated, paranoid state, he *might* have pulled the trigger himself when he shot Hill. Rather, he continues to insist that the gun went off accidentally as he lifted it up or lowered it down. The Governor could reasonably conclude that defendant has not yet faced up to the high likelihood that he was in a similar state of mind when he shot Hill as when he went on the February 7 shooting rampage; i.e., exploding into intentional violence because of his distorted thinking arising from chronic drug usage and intoxication.

To support his position that there is no evidence to support the Governor's decision, defendant notes that second degree murder culpability does not require a specific intent to kill; rather, implied malice based on a deliberate act accompanied by a conscious disregard for life suffices to establish the mental state for second degree murder. (See *People v. Nieto* (1992) 4 Cal.4th 91, 102, 104, 108, 110 [second degree murder established "[e]ven if the act results in a death that is accidental" if "the circumstances surrounding the act evince implied malice"].) Even assuming defendant could reasonably claim he did not specifically intend to kill Hill, the fact remains that he has not admitted the conduct directly giving rise to Hill's death — i.e., the pulling of the trigger. The record supports the Governor's decision based on defendant's insistence that the trigger was pulled by a force distinct from his own action, without acknowledging the very real possibility that, at a minimum, he pulled the trigger because of his intoxication and/or paranoia.

Defendant also points out that the Governor mischaracterized the record when stating that defendant claimed he *saw* Hill open the trunk, whereas the record shows defendant (who was inside the house) merely claimed he *heard* what he thought was Hill opening the trunk. Notwithstanding this factual error by the Governor, the record supports the Governor's decision. As stated, the Governor could reasonably conclude that defendant has not yet taken full responsibility for his behavior by failing to acknowledge that he either did pull the trigger, or very well could have, given his pursuit of the victim with a loaded, cocked gun and his intoxicated and paranoid state of mind. Further, we are satisfied that based on this lack of insight finding, the Governor would

have reached the same conclusion rejecting parole even if he had not made the factual error concerning defendant's explanation for coming outside with the gun. (See *In re Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

Although defendant has made commendable gains while incarcerated and could reasonably be assessed to no longer pose a risk to society if released, we are required to defer to the Governor's conclusion if it is supported by some evidence showing a continued risk. The Governor could reasonably conclude that defendant's failure to acknowledge that in his intoxicated, drug-altered state of mind he may well have pulled the trigger reflects a minimization of his culpability. Based on the showing that defendant does not have a full recognition of the violent conduct of which he is capable when he is not sober, the Governor could reasonably assess that defendant still posed an unreasonable risk of repeating the behavior once he is free in the community and not subject to the controlled prison environment.

II. *Ex Post Facto Challenge*

Defendant also argues that his due process rights were violated because the law providing for the Governor's review of the Board's decision (Cal. Const., art. V, § 8, subd. (b)) was adopted in 1988 which was after his 1983 commission of the underlying offense. (See *In re Rosenkrantz, supra*, 29 Cal.4th at p. 625.) He asserts this constitutes unconstitutional ex post facto application of a law. Defendant recognizes that an ex post facto challenge to this constitutional provision was rejected by the California Supreme Court in *Rosenkrantz*.

Rosenkrantz held there was no ex post facto problem because the provision simply created a new level of review of parole decisions within the executive branch, thereby changing the identity of the ultimate decision maker, but with no change in the substantive standard governing the grant or denial of parole. (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 638.) *Rosenkrantz* explained that the ex post facto prohibition did not apply to any change in the law that disadvantaged the defendant, but only to changes that altered the definition of crimes or increased the punishment for crimes. (*Id*. at p. 639-640.) *Rosenkrantz* concluded that the law authorizing gubernatorial review did not increase the punishment because the length of the defendant's sentence (15 years to life with the possibility of parole) remained the same and the substantive standard for the parole decision remained the same. (*Id*. at p. 640.) Further, although a defendant has a reasonable expectation that parole suitability will be decided under the standards existing at the time of the crime, the defendant has no reasonable expectation that the identity of the persons who will decide parole suitability will not change over time. (*Id*. at pp. 640-641.)

Defendant asserts *Rosenkrantz*'s holding does not apply here because *Rosenkrantz* involved a facial challenge to the provision, whereas he presents an as-applied challenge because the Board independently determined that he was eligible for parole.[9] The contention that *Rosenkrantz's* analysis does not apply to situations where the Board found

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9 In *Rosenkrantz*, the Board had decided the defendant was not eligible for parole, but later granted parole only upon a mandatory directive from the appellate court. (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 637.)

parole suitability is unavailing. *Rosenkrantz* expressly recognizes that there is no ex post facto violation arising from a procedural change adding a new level of review even though the change works to a particular defendant's detriment. (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 642.) *Rosenkrantz* notes that because a defendant has no reasonable expectation that parole suitability will be determined by the particular individuals who happen to exercise parole authority at the time of the crime, the circumstance that a particular governor may frequently disagree with the Board does not create an ex post facto violation; indeed, a similar reduction in parole grants could also arise from a change in the composition of the Board itself. (*Id*. at pp. 651-652.)

The appellate courts have applied *Rosenkrantz*'s holding in the context of a Board finding of parole suitability followed by a gubernatorial reversal. (See, e.g., *In re Smith* (2003) 114 Cal.App.4th 343, 349, 364-365 [no ex post facto violation even though Governor's reversal creates net result of longer incarceration than without gubernatorial review]; accord *In re Elkins* (2006) 144 Cal.App.4th 475, 479, 489; *In re Tripp, supra*, 150 Cal.App.4th at pp. 311-312, fn. 5.) Based on *Rosenkrantz*, we reject defendant's ex post facto argument.

III. *Challenge Based on Lack of Individualized Consideration*

Defendant argues the Governor did not engage in the required individualized consideration of his case, but rather made an arbitrary, politically expedient reversal. We are not persuaded. The Governor's written articulation of reasons for his decision reflects a consideration of both the positive and negative factors relevant to the parole decision in defendant's particular case. The record shows the Governor engaged in the proper

individualized examination of the case. (See *In re Rosenkrantz, supra*, 29 Cal.4th at pp. 683-686.)

DISPOSITION

The relief requested in the petition for writ of habeas corpus is denied.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.